NO. 06-35669

**UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

MUHAMMAD SHABAZZ FARRAKHAN, et. al.,

Plaintiffs-Appellants,

v.

CHRISTINE O. GREGOIRE, et al.,

Defendants-Appellees.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON
AT SPOKANE

No. CV-96-076-RHW
The Honorable Robert H. Whaley
United States District Court Judge

# SUPPLEMENTAL BRIEF OF DEFENDANTS-APPELLEES RESPONDING TO AMICI CURIAE BRIEFS

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## INTRODUCTION

Christine O. Gregoire and the other appellees submit this brief pursuant to the Court's order filed July 28, 2010, authorizing each party to file a supplemental brief to respond to the amici curiae briefs filed in connection with rehearing en banc.

## ARGUMENT

### A. The Fourteenth Amendment Affirmatively Sanctions Felon Disenfranchisement, But Not When Disenfranchisement Is Enacted For The Purpose Of Discrimination

Section 2 of the Fourteenth Amendment to the United States Constitution provides, in part:

> Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But *when the right to vote at any election . . . is denied* to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, *except for participation in rebellion, or other crime*, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

(Emphasis added.)

The constitutional parameters for disenfranchisement based on a criminal conviction were established by *Richardson v. Ramirez*, 418 U.S. 24, 94 S. Ct. 2655, 41 L. Ed. 2d 551 (1974), and *Hunter v. Underwood*, 471

U.S. 222, 223, 105 S. Ct. 1916, 85 L. Ed. 2d 222 (1985). In *Richardson*, the plaintiffs "were convicted of felonies and [had] completed the service of their respective sentences and paroles." *Richardson*, 418 U.S. at 26. They argued that disenfranchisement violated their rights to equal protection under the Fourteenth Amendment. The Court rejected this claim because "the exclusion of felons from the vote has an affirmative sanction in [Section] 2 of the Fourteenth Amendment[.]" *Richardson*, 418 U.S. at 54. The Court explained that "the understanding of those who adopted the Fourteenth Amendment, as reflected in the express language of [Section] 2 and in the historical and judicial interpretation of the Amendment's applicability to state laws disenfranchising felons, is of controlling significance[.]" *Id*.

*Hunter* is on the other end of the spectrum. Section 182 of the Alabama Constitution disenfranchised felons for a list of crimes including "any crime punishable by imprisonment in the penitentiary[.]" *Hunter*, 471 U.S. at 223 n."*". However, *Hunter* did not involve disenfranchisement of felons. Rather, the plaintiffs challenged another part of section 182 that disenfranchised "persons convicted of crimes not punishable by imprisonment in the state penitentiary (misdemeanors)[.]" *Id.* at 224. The Court concluded that there

was a disparate impact because "blacks are by even the most modest estimates at least 1.7 times as likely as whites to suffer disfranchisement under section 182 for the commission of nonprison offenses." *Hunter*, 471 U.S. at 227 (quoting *Underwood v. Hunter*, 730 F.2d 614, 620 (11th Cir. 1984)). However, under the Fourteenth Amendment, disparate impact was not enough. According to the Court: "[O]fficial action will not be held unconstitutional solely because it results in a racially disproportionate impact. . . . Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause." *Id.* at 227–28 (alterations in original) (quoting *Vill. of Arlington Heights v. Metro. Housing Dev.*, 429 U.S. 252, 264–65, 97 S. Ct. 555, 50 L. Ed. 2d 450 (1977)). The Court found racially discriminatory intent because the "Alabama Constitutional Convention of 1901 was part of a movement that swept the post-Reconstruction South to disenfranchise blacks." *Id.* at 229. Accordingly, the Court struck down the portion of section 182 that disenfranchised based on nonprison offenses. The Court distinguished *Richardson* because "we are confident that [Section] 2 was not designed to permit the purposeful racial discrimination attending the enactment and operation of [section] 182[.]" *Id.* at 233.

Thus, Section 2 of the Fourteenth Amendment affirmatively sanctions disenfranchisement based on a criminal conviction, unless the purpose of the law was to discriminate. Purposeful discrimination is also required to establish a violation of the Fifteenth Amendment. *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 481, 117 S. Ct. 1491, 137 L. Ed. 2d 730 (1997) (Fifteenth Amendment has been required to establish that the State or political subdivision acted with a discriminatory purpose). The district court ruled that Washington's felon disenfranchisement did not violate either the Fourteenth or Fifteenth Amendments because the plaintiffs (collectively, Farrakhan) did not establish that Washington enacted felon disenfranchisement for the purpose of discrimination. *Farrakhan v. Locke*, 987 F. Supp. 1304, 1314 (E.D. Wash. 1997). Farrakhan does not challenge this ruling.

This appeal concerns the application of § 2 of the Voting Rights Act (VRA), 42 U.S.C. § 1973, as amended by Congress in 1982. The amendment was primarily a response to an earlier plurality opinion of the Supreme Court that "declared that, in order to establish a *violation either of § 2 [of the VRA]* or of the Fourteenth or Fifteenth Amendments, minority voters must prove that a contested electoral mechanism *was intentionally adopted or maintained by state officials for a discriminatory purpose*." *Thornburg v. Gingles*, 478

U.S. 30, 35, 106 S. Ct. 2752, 92 L. Ed. 2d 25 (1986) (emphasis added). "Congress substantially revised § 2 to make clear that a violation could be proved by showing discriminatory effect alone and to establish as the relevant legal standard the 'results test'[.]" *Thornburg*, 478 U.S. at 35. Thus, § 2 reaches laws that do not violate the Constitution. The Court has ruled that Congress has the power under the Fourteenth and Fifteenth Amendments to enact "[l]egislation which deters or remedies constitutional violations [that] can fall within the sweep of Congress'[s] enforcement power even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into legislative spheres of autonomy previously reserved to the States." *Lopez v. Monterey Cnty.*, 525 U.S. 266, 282–83, 119 S. Ct. 693, 142 L. Ed. 2d 728 (1999) (first alteration in original) (quoting *City of Boerne v. Flores*, 521 U.S. 507, 518, 117 S. Ct. 2157, 138 L. Ed. 2d 624 (1997)).

The question is whether Congress intended to apply § 2 of the VRA to a felon disenfranchisement law that is valid under the Fourteenth and Fifteenth Amendments. The answer to this question is no. Section 2 of the VRA does not apply to felon disenfranchisement. This is the unanimous conclusion of the

three circuits of the courts of appeal that have considered this question. *Simmons v. Galvin*, 575 F.3d 24, 26 (1st Cir. 2009); *Hayden v. Pataki*, 449 F.3d 305, 310 (2d Cir. 2006) (*en banc*); *Johnson v. Governor of Florida*, 405 F.3d 1214, 1234 (11th Cir. 2005) (*en banc*).

## B. The VRA Does Not Apply To Felon Disenfranchisement

### 1. The Text Of § 2 Of The VRA Establishes That It Does Not Apply To Felon Disenfranchisement

Section 2 of the VRA provides, in part:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2), as provided in subsection (b).
>
> (b) *A violation of subsection (a) is established* if, based on the totality of circumstances, it is shown *that the political processes* leading to nomination or election in the State or political subdivision *are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity* than other members of the electorate to participate in the political process and to elect representatives of their choice. . . .

42 U.S.C. § 1973 (emphasis added).

In determining whether § 2 applies to felon disenfranchisement, the "starting point . . . is the language of the statute itself. Absent congressional

direction to the contrary, words in statutes are to be construed according to their ordinary, contemporary, common meaning." *United States v. Gossi*, 608 F.3d 574, 577 (9th Cir. 2010) (citation and internal punctuation omitted). The Brennan Center argues that the plain meaning of § 2(a) applies to felon disenfranchisement arguing "that Section 2 of the VRA unequivocally prohibits *any* voting qualifications, standards, practices and procedures applied by any State "which result[ ] in a denial or abridgement of the right of *any* citizen of the United States to vote on account of race or color." 42 U.S.C. § 1973(a)." Brennan Ctr. Amicus Br. at 6–7, 12–13.

The problem with this argument is that it completely ignores § 2(b). "The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341, 117 S. Ct. 843, 136 L. Ed. 2d 808 (1997).

Subsections (a) and (b) are to be read together. "Subsection (a) adopts a results test, thus providing that proof of discriminatory intent is no longer necessary to establish *any* violation of the section. Subsection (b) provides guidance about how the results test is to be applied." *Chisom v. Roemer*, 501 U.S. 380, 395, 111 S. Ct. 2354, 115 L. Ed. 2d 348 (1991).

Subsection (b) supports the argument that subsection (a) does not apply to felon disenfranchisement laws. Subsection (b) "provides that a violation of the VRA can be established if 'the *political processes* leading to nomination or election in the State or political subdivision *are not equally open to participation' by members of a protected class of citizens* such that 'its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.' 42 U.S.C. § 1973(b)." *Hayden*, 449 F.3d at 321. It is clear that "incarcerated persons cannot 'fully participate in the political process'—they cannot petition, protest, campaign, travel, freely associate, or raise funds. It follows that Congress did not have this subpopulation in mind when the VRA section at issue took its present form in 1982." *Id.*; *accord Simmons*, 575 F.3d at 40–41.

If § 2(b) does not establish that the VRA does not apply to felon disenfranchisement, at the very least, it renders the statute ambiguous so the plain meaning rule does not apply. *Simmons*, 575 F.3d at 35 ("We agree with the Second Circuit that the language of § 2(a) is both broad and ambiguous and that judicial interpretation of a claim concerning felon disenfranchisement under the VRA may not be limited to the text of § 2(a) alone."); *accord Hayden*, 449 F.3d at 315.

### 2. The Legislative History Of The VRA Supports The Conclusion That It Does Not Apply To Felon Disenfranchisement

The legislative history surrounding the adoption of the VRA in 1965 and the 1982 amendments to the Act support the conclusion that it does not apply to felon disenfranchisement.

#### a. Legislative History In 1965

"Congress first passed the [VRA] in 1965 to prevent states from discriminating against minorities in voting. The act was intended to reach voting tests and other practices, such as districts designed by states to minimize minority voting." *Johnson*, 405 F.3d at 1232. "[Section] 2 [of the VRA] tracked, in part, the text of the Fifteenth Amendment." *Bartlett v. Strickland*, 129 S. Ct. 1231, 1240 (2009). "Beyond § 2, the remainder of the VRA set up a scheme of stringent remedies to address the most flagrant practices." *Simmons*, 575 F.3d at 36.

Section 4(a)–(d) [laid] down a formula defining the States and political subdivisions to which these new remedies appl[ied]." *South Carolina v. Katzenbach*, 383 U.S. 301, 315, 86 S. Ct. 803, 15 L. Ed. 2d 769 (1966). The law banned certain tests and devices in the covered jurisdiction. Section 4(c) of the VRA "defin[ed] the statutory term '[t]est or device' to mean 'any

requirement that a person as a prerequisite for voting or registration for voting (1) demonstrate the ability to read, write, understand, or interpret any matter, (2) demonstrate any educational achievement or his knowledge of any particular subject, (3) *possess good moral character*, or (4) prove his qualifications by the voucher of registered voters or members of any other class.' 42 U.S.C. § 1973b(c)." *Hayden*, 449 F.3d at 317 n.13 (emphasis added) (first alteration ours). States used the requirement of good moral character to disenfranchise individuals who had been convicted of minor crimes. An example of this kind of device is the provision in the Alabama Constitution, at issue in *Hunter*, 471 U.S. at 224, that required disenfranchisement of individuals convicted of misdemeanors.

It is clear from the record that the ban on using a good moral character requirement to disenfranchise voters did not apply to felon disenfranchisement. The Senate Judiciary Committee Report stated that the provision "would not result in the proscription of the frequent requirement of States and political subdivisions that an applicant for voting or registration for voting be free of conviction of a felony or mental disability." S. Rep. No. 89-162, at 24 (1965), *reprinted in* 1965 U.S.C.C.A.N. 2508, 2562 (joint views of Senators Dodd, Hart, Long, Kennedy, Bayh, Burdick, Tydings, Dirksen, Hruska, Fong, Scott,

and Javits). The report from the House of Representatives concurred, stating that the "subsection does not proscribe a requirement of a State or any political subdivision of a State that an applicant for voting or registration for voting be free of conviction of a felony or mental disability." H.R. Rep. No. 89-439, at 25–26 (1965), *reprinted in* 1965 U.S.C.C.A.N. 2437, 2457. On the Senate floor, Senator Joseph D. Tydings of Maryland explained that section 4(c) was not intended to prohibit "a requirement that an applicant for voting or registration for voting be free of conviction of a felony or mental disability. Those grounds for disqualification are objective, easily applied, and do not lend themselves to fraudulent manipulation." 111 Cong. Rec. S8366 (daily ed. April 23, 1965) (statement of Sen. Tydings).

The Brennan Center argues that the history of § 4 is not relevant to the interpretation of § 2, because the history "merely clarifies that felon disenfranchisement laws would not be considered 'moral character tests' for purposes of the outright ban on 'tests and devices' in Section 4. This language does nothing more than reinforce the idea—not in dispute here—that felon disenfranchisement laws are not *per se* violations of the VRA and may be legally permissible if they do not result in racial discrimination." Brennan Ctr. Amicus Br. at 20–21. However, "Congress's effort to highlight the exclusion

of felon disenfranchisement laws from a VRA provision that otherwise would likely be read to invalidate such laws is indicative of its broader intention to exclude such laws from the reach of the statute." *Hayden*, 449 F.3d at 319. "Congress could not have intended to create a cause of action under § 2 of the VRA against disenfranchisement of incarcerated felons while saying explicitly elsewhere that it did not intend to proscribe any such laws." *Simmons*, 575 F.3d at 37. Indeed, "the emphatic language chosen to provide assurance that felon disenfranchisement laws remain unaffected by the statute suggests that these statements be read to indicate that '*not even this section* applies to felon disenfranchisement laws,' rather than '*this section* does not apply to felon disenfranchisement laws, but other sections might,'" as the Brennan Center argues. *Hayden*, 449 F.3d at 319.

There is a second reason why the history of § 4 sheds light on § 2. "[Section] 4 applied to covered jurisdictions. Congress would not have permitted felon disenfranchisement laws in covered jurisdictions where there was a history of discrimination, while prohibiting them in non-covered jurisdictions like Massachusetts." *Simmons*, 575 F.3d at 37.

This legislative history of the VRA at its adoption in 1965 points strongly to the fact that Congress did not intend § 2 to apply to felon disenfranchisement.

**b. Legislative History In 1982**

At the outset, it is important to note that the 1982 amendments "focused only on the means of proving a violation." *Hayden*, 449 F.3d at 322 n.19. The amendments changed "subsection (a) from 'to deny or abridge the right of any citizen of the United States to vote on account of race or color' to 'in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color' and adding subsection (b)." *Hayden*, 449 F.3d at 322 n.19. And, as we have explained, the language of subsection (b) supports the interpretation that § 2 does not apply to felon disenfranchisement. *See supra* p. 6–8. "The 1982 revisions did not address the first part of subsection (a), dealing with the voting provisions subject to the Act, and there is no basis upon which [to] conclude that the intent of the 1982 Congress with regard to coverage was any different than that of the 1965 Congress." *Hayden*, 449 F.3d at 322 n.19.

Congress "amended the [VRA] in 1982 in response to the Supreme Court's decision in *City of Mobile v. Bolden*, 446 U.S. 55, 100 S. Ct. 1490, [64

L. Ed. 2d 47] (1980), in an attempt to clarify the standard for finding § 2 violations." *Johnson*, 405 F.3d at 1233. In *Bolden*, a plurality of the Court stated "it is apparent that the language of § 2 no more than elaborates upon that of the Fifteenth Amendment, and the sparse legislative history of § 2 makes clear that it was intended to have an effect no different from that of the Fifteenth Amendment itself." *City of Mobile v. Bolden*, 446 U.S. 55, 60–61, 100 S. Ct. 1490, 64 L. Ed. 2d 47 (1980) (footnote omitted). And, the plurality explained that "action by a State that is racially neutral on its face violates the Fifteenth Amendment only if motivated by a discriminatory purpose." *Bolden*, 466 U.S. at 62.

"In revising the statute, Congress intended to depart from the intent-based standard of the Supreme Court's Equal Protection jurisprudence and establish an effects-based standard." *Johnson*, 405 F.3d at 1233–34. The Senate Report states:

> This Amendment is designed to make clear that proof of discriminatory intent is not required to establish a violation of [§] 2. It thereby restores the legal standards, based on the controlling Supreme Court precedents, which applied in voting discrimination claims prior to the litigation involved in *Mobile v. Bolden*. The amendment also adds a new subsection to [§] 2 which delineates the legal standards under the results test by codifying the leading pre-*Bolden* vote dilution case, *White v. Regester*.

S. Rep. No. 97-417, at 2 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 179; *see also id.* at 27, *reprinted in* 1982 U.S.C.C.A.N. at 205 ("The 'results' standard is meant to restore the pre-*Mobile* legal standard which governed [vote dilution cases]."). "After the 1982 amendment, a state practice could survive Equal Protection Clause scrutiny but fail [§] 2 Voting Rights Act scrutiny." *Johnson*, 405 F.3d at 1234.

"The Senate Report, which detail[ed] many discriminatory techniques used by certain jurisdictions, made no mention of felon disenfranchisement provisions." *Johnson*, 405 F.3d at 1234. This omission is remarkable if Congress was truly concerned with felon disenfranchisement. Felon disenfranchisement has a long history in the country. "[L]aws disenfranchising felons were adopted in the American Colonies and the Early American Republic[.]" *Hayden*, 449 F.3d at 316. "[E]leven state constitutions adopted between 1776 and 1821 prohibited or authorized the legislature to prohibit exercise of the franchise by convicted felons[.]" *Id.* at 317. "[T]wenty-nine states had such provisions when the Fourteenth Amendment was adopted in 1868." *Id.* (internal quotation marks omitted). "[C]onsidering the prevalence of felon disenfranchisement [provisions] in every region of the country since the Founding, it seems unfathomable that Congress would silently amend the

[VRA] in a way that would affect them. There is simply no discussion of felon disenfranchisement in the legislative history surrounding the 1982 amendments." *Johnson*, 405 F.3d at 1234 (second alteration in original) (citation and internal quotation marks omitted).

Obviously, a discriminatory technique did not have to be discussed in the Senate Report to be covered by § 2 of the VRA. "[I]n enacting § 2, Congress noted that it was impossible to predict the variety of means that would be used to infringe on the right to vote and that the voting rights landscape was marked by innovation in discrimination. S. Rep. No. 89-162, at 5 (1965); S. Rep. No. 89-439, at 10." *Simmons*, 575 F.3d at 40. However, "these concerns do not go to felon disenfranchisement, which was neither a new innovation nor a predictable future innovation. Felon disenfranchisement was a well-known and accepted part of the voting landscape." *Id*.[1]

[1] "Subsequent Congressional actions provide additional evidence that Congress has not understood the [VRA] to cover felon disenfranchisement laws." *Hayden*, 449 F.3d at 322. Examples include "the National Voter Registration Act, enacted in 1993, explicitly provides for 'criminal conviction' as a basis upon which voters' names may be removed from lists of eligible voters. *See* Pub. L. No. 103-31, 107 Stat. 77 (codified at 42 U.S.C. § 1973gg-6(a)(3)(B))." *Id.* at 322.

### 3. Interpreting § 2 Of The VRA Not To Apply To Felon Disenfranchisement Is Consistent With Limits On Congress's Power To Enforce The Fourteenth And Fifteenth Amendments

"The Fourteenth and Fifteenth Amendments to the United States Constitution grant Congress the power to enforce those amendments' substantive provisions 'by appropriate legislation.' U.S. Const. amend. XIV, § 5; XV, § 2." *Johnson*, 405 F.3d at 1230. This includes the power to "enforce the substantive provisions of these Amendments by regulating conduct that does not directly violate those Amendments." *Id*. Thus, after § 2 was amended in 1982, "a state practice could survive Equal Protection Clause scrutiny but fail [§] 2 Voting Rights Act scrutiny." *Johnson*, 405 U.S. at 1234. The Supreme Court has explained that "Congress may enact so-called prophylactic legislation that proscribes facially constitutional conduct, in order to prevent and deter unconstitutional conduct." *Id*. at 1230 (quoting *Nevada Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 727–28, 123 S. Ct. 1972, 155 L. Ed. 2d 953 (2003)).

However, "Congress's power in this regard is not absolute. To be a valid exercise of Congress's enforcement power, 'there must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.' *City of Boerne v. Flores*, 521 U.S. 507, 520, 117

S. Ct. 2157, 138 L. Ed. 2d 624 (1997)." *Johnson*, 405 F.3d at 1230. Thus, Congress "must identify conduct transgressing the Fourteenth Amendment's substantive provisions, and must tailor its legislative scheme to remedying or preventing such conduct." *Florida Prepaid Postsecondary Educ. Expense Bd. v. Coll. Savs. Bank*, 527 U.S. 627, 639, 119 S. Ct. 2199, 144 L. Ed. 2d 575 (1999).

"Congress undoubtedly has the constitutional authority to prohibit many measures that are not explicitly prohibited by the Fourteenth Amendment[.]" *Johnson*, 405 F.3d at 1230. However, in the case of felon disenfranchisement, it is not a matter of prohibiting something that is not explicitly prohibited by the Fourteenth Amendment. Rather, "the exclusion of felons from the vote has an affirmative sanction in [S]ection 2 of the Fourteenth Amendment[.]" *Johnson*, 405 F.3d at 1229 (quoting *Richardson*, 418 U.S. at 54).

Interpretation of § 2 of the VRA, as a prophylactic measure that applies to felon disenfranchisement that was not motivated by a discriminatory purpose, "raises serious constitutional problems because such an interpretation allows a congressional statute to override the text of the Constitution." *Johnson*, 405 F.3d at 1229. "It is a long-standing rule of statutory

interpretation that federal courts should not construe a statute to create a constitutional question unless there is a clear statement from Congress endorsing this understanding." *Id*. In this case, the Court should interpret § 2 of the VRA not to apply to felon disenfranchisement, because applying § 2 to felon disenfranchisement fails the first part of the congruence and proportionality test. There is no evidence that Congress identified felon disenfranchisement as a practice that transgressed the Constitution's substantive provisions. *See supra* p. 9–16.

The Law Professors argue that the congruence and proportionality requirement in *City of Boerne v. Flores*, 521 U.S. 507, 117 S. Ct. 2157, 138 L. Ed. 2d 624 (1997), does not apply because *City of Boerne* was a Fourteenth Amendment case, and the decision "does not itself limit in any way the broad powers Congress enjoys in light of the decisions in *South Carolina v. Katzenbach* and *City of Rome* to enforce the *Fifteenth* Amendment." Law Professors' Amicus Br. 25. This argument is not well-taken.

First, *South Carolina v. Katzenbach*, 383 U.S. 301, 309, 86 S. Ct. 803, 15 L. Ed. 2d 769 (1966), upheld the VRA adopted in 1965. According to the Court in *Katzenbach*, "Congress assumed the power to prescribe these remedies from [Section] 2 of the Fifteenth Amendment[.]" *Katzenbach*, 383

U.S at 308. *City of Boerne* relied extensively on *Katzenbach*, and, although the Court in *Katzenbach* did not use the terms congruence and proportionality, *City of Boerne* contrasted the presence of those requirements in the adoption of the VRA with the absence of those requirements in the adoption of the Religious Freedom Restoration Act.

The *Boerne* Court explained that in "*Katzenbach* . . . we upheld various provisions of the [VRA], finding them to be 'remedies aimed at areas where voting discrimination has been most flagrant,' and necessary to 'banish the blight of racial discrimination in voting, which has infected the electoral process in parts of our country for nearly a century[.]'" *City of Boerne*, 521 U.S. at 525 (citation omitted). *City of Boerne* pointed out that in *Katzenbach* there was "evidence in the record reflecting the subsisting and pervasive discriminatory—and therefore unconstitutional—use of literacy tests." *City of Boerne*, 521 U.S. at 525. And, *Boerne* explained that the *Katzenbach* Court relied on the relationship of the remedy to the problem, stating that "new, unprecedented remedies were deemed necessary given the ineffectiveness of the existing voting rights laws, and the slow, costly character of case-by-case litigation[.]" *City of Boerne*, 521 U.S. at 526 (citation omitted).

Second, the Supreme Court struck down legislation enacted under Congress's Fifteenth Amendment power when there was no evidence of a practice that was the subject of the legislation that transgressed the constitution's substantive provisions. In *Oregon v. Mitchell*, 400 U.S. 112, 128, 91 S. Ct. 260, 27 L. Ed. 2d 272 (1970), the Court addressed 1970 amendments to the VRA that "lower[ed] the minimum age of voters in both state and federal elections from 21 to 18" and banned "the use of such tests in all elections, state and national, for a five-year period." *Mitchell*, 400 U.S. at 117. The Court stated that the "Thirteenth, Fourteenth, Fifteenth, and Nineteenth Amendments have expressly authorized Congress to 'enforce' the limited prohibitions of those amendments by 'appropriate legislation.'" *Mitchell*, 400 U.S. at 126. However, the Court explained that "[a]s broad as the congressional enforcement power is, it is not unlimited." *Id*. at 128. For example, "Congress [could] not by legislation repeal other provisions of the Constitution." *Id*.

In analyzing the two provisions at issue, *Mitchell* did not use the terms congruence and proportionality, but the Court's reasoning was consistent with *City of Boerne*. The Court struck down the provision lowering the voting age from 21 to 18 in state and local elections because "Congress made no

legislative findings that the 21-year-old vote requirement was used by the States to disenfranchise voters on account of race." *Mitchell*, 400 U.S. at 130. "Since Congress has attempted to invade an area preserved to the States by the Constitution *without a foundation for enforcing the Civil War Amendments' ban on racial discrimination*, I would hold that Congress has exceeded its powers in attempting to lower the voting age in state and local elections." *Id.*

In contrast, "[i]n enacting the literacy test ban of Title II Congress had before it a long history of the discriminatory use of literacy tests to disfranchise voters on account of their race." *Mitchell*, 400 U.S. at 132. Congress also had "striking evidence to show that the provisions of the 1965 Act had had in the span of four years a remarkable impact on minority group voter registration" and "statistics which demonstrate[d] that voter registration and voter participation [was] consistently greater in States without literacy tests." *Id*. at 133. The Court also pointed to "this country's history of discriminatory educational opportunities in both the North and the South." *Id.* Simply put, the Law Professors are mistaken in their claim that laws passed by Congress to enforce the Fifteenth Amendment do not have to meet the requirements of congruence and proportionality.

The Law Professors argue at length that "Congress's authority to enact results tests is reinforced by the Court's post-*Boerne* decisions." Law Professors' Amicus Br. at 28. This argument misses the point. We do not argue that Congress does not have the authority to adopt the results test. Rather, we argue that § 2 of the VRA lacks congruence and proportionality as applied to felon disenfranchisement.

The Law Professors also argue that no evidence is required that Congress was concerned about felon disenfranchisement—relying primarily on the example of literacy tests. For example, the Law Professors point to the fact that "the Court upheld a national ban on literacy tests in *Mitchell* even assuming that the test in question had not been adopted or administered invidiously and that the state's own education system was free from unconstitutional discrimination[.]" Law Professors' Amicus Br. at 16–17. This argument misses the mark for two reasons.

First, in *Mitchell*, the Court recognized that the evidence about discrimination in literacy tests was pervasive. *See supra* p. 21–22. As the Court explained, "[i]n imposing a nationwide ban on literacy tests, Congress has

recognized a national problem for what it is—a serious *national* dilemma that touches every corner of our land." *Mitchell*, 400 U.S. at 133. In the record before Congress, there was no evidence that discrimination in felon disenfranchisement was of concern. This omission is striking, "[g]iven the widespread existence of felon disenfranchisement laws throughout this Nation's history and the fact that many States had such laws on their books when the VRA was enacted[.]" *Johnson*, 405 F.3d at 1231 n.33. The "Supreme Court still requires *some* record of constitutional violations to ensure that Congress had an adequate constitutional basis for prophylactic legislation." *Id*. at 1231 n.34.

Second, there is a fundamental difference between literacy tests, and the various other practices that discriminate based on race and felon disenfranchisement. Felon disenfranchisement has the affirmative sanction of Section 2 of the Fourteenth Amendment; literacy tests and other practices that have discriminatory results do not. For this reason, it is particularly important to be sure that Congress intended to apply the results test of § 2 of the VRA to prohibit felon disenfranchisement laws that have the affirmative sanction of Section 2 of the Fourteenth Amendment.

### 4. Interpreting § 2 Of The VRA Not To Apply To Felon Disenfranchisement Is Consistent With The Clear Statement Rule

A decision that § 2 of the VRA does not apply to felon disenfranchisement is consistent with the Clear Statement Rule. The Clear Statement Rule is a cannon of construction that provides: "[I]f Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute." *Gregory v. Ashcroft*, 501 U.S. 452, 460–61, 111 S. Ct. 2395, 115 L. Ed. 2d 410 (1991) (alteration in original) (internal quotation marks omitted) (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242, 105 S. Ct. 3142, 87 L. Ed. 2d 171 (1985)). The Court explained that "[i]n traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision." *Gregory*, 501 U.S. at 461 (quoting *United States v. Bass*, 404 U.S. 336, 349, 92 S. Ct. 515, 30 L. Ed. 2d 488 (1971)). Thus, "federal courts will construe a statute to alter the federal balance only when Congress expresses an affirmative intention to do so." *Hayden*, 449 F.3d at 324.

In this case, applying § 2 of the VRA to felon disenfranchisement alters the usual constitutional balance between the States and the Federal Government with respect to two important state interests.

First, "[t]here is no question that regulation of the franchise is an important state interest and that interfering with a State's power to govern this area would disrupt the federal balance." *Hayden*, 449 F.3d at 326. "No function is more essential to the separate and independent existence of the States and their governments than the power to determine within the limits of the Constitution the qualifications of their own voters for state, county, and municipal offices and the nature of their own machinery for filling local public offices." *Id*. (quoting *Mitchell*, 400 U.S. at 125 (Black, J.)).

Second, "the State has a powerful interest in the administration of its prisons. Indeed, one of the primary functions of government is the preservation of societal order through enforcement of the criminal law, and the maintenance of penal institutions is an essential part of that task." *Hayden*, 449 F.3d at 327 (internal quotation marks omitted). The Supreme Court has gone so far as to say "[i]t is difficult to imagine an activity in which a State has a stronger interest." *Pennsylvania Dep't of Corr. v. Yeskey*, 524 U.S. 206, 209, 118 S. Ct. 1952, 141 L. Ed. 2d 215 (1998) (quoting *Preiser v. Rodriguez*, 411

U.S. 475, 491, 93 S. Ct. 1827, 36 L. Ed. 2d 439 (1973)). Because Washington felon disenfranchisement "is limited to those confined in penal institutions and on parole, applying the [VRA] to the provision would surely affect the State's powers in this area as well." *Hayden*, 449 F.3d at 327.

In light of these important state interests, "construing the VRA to encompass prisoner disenfranchisement provisions like that of [Washington] would unquestionably alter the federal balance." *Hayden*, 449 F.3d at 327–28. The language of § 2(b) of the VRA (*supra* p. 6–8) and the legislative history of the 1965 enactment and the 1982 amendments (*supra* p. 9–16) "compel [the] conclu[sion] that Congress unquestionably did not manifest an 'unmistakably clear' intent to include felon disenfranchisement laws under the VRA." *Hayden*, 449 F.3d at 328. Accordingly, the requirements of the Clear Statement Rule are not met, and the Court should not construe the VRA to reach Washington's felon disenfranchisement law.

The Brennan Center argues that the Clear Statement Rule does not apply because § 2 of the VRA is "unambiguous, broadly prohibiting all voting qualifications that result in the denial of the right to vote on account of race[.]" Brennan Ctr. Amicus Br. 22–23. This argument is not well-taken. As we have explained (*supra* p. 6–8), the language in § 2(b) supports the conclusion that

§ 2 does not apply to felon disenfranchisement. A violation of § 2(a) of the VRA is established when the political processes "are not equally open to participation by members of a class of citizens protected by subsection (a)[.]" 42 U.S.C. § 1973(b). Felons in prison do not fall within the class protected by § 2(a), because the political process cannot be equally open while they are in prison.

Moreover, in light of the legislative history, "there is a significant amount of evidence that Congress did not intend the VRA to encompass felon disenfranchisement laws, and, at the very least, was convinced it had not done so. Accordingly, the broad language of the VRA notwithstanding, it is *not* entirely clear that Congress meant to alter the federal balance by encompassing felon disenfranchisement laws within the coverage of the VRA[.]" *Hayden*, 449 F.3d at 324 n.21.

The Brennan Center also argues that Congress did not alter the constitutional balance between the States and the Federal Government with the passage of the VRA. Rather, the balance was altered by the passage of the Fourteenth and Fifteenth Amendments. Brennan Ctr. Amicus Br. 23–24. The problem with this argument is that it ignores the fact that the Fourteenth Amendment did not alter the balance between the federal government and the

states with regard to felon disenfranchisement. As the Court explained in *Richardson v. Ramirez*, 418 U.S. 24, 54, 94 S. Ct. 2655, 41 L. Ed. 2d 551 (1974), "the exclusion of felons from the vote has an affirmative sanction in [Section] 2 of the Fourteenth Amendment[.]" The Fifteenth Amendment altered the balance between the States and the Federal Government to the extent that it prohibits States from using disenfranchisement to intentionally discriminate. However, applying § 2 of the VRA to felon disenfranchisement that is constitutional under the Fifteenth Amendment "would introduce a change in the federal balance not contemplated by the framers of the Fourteenth Amendment." *Hayden*, 449 F.3d at 326.

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### C. If The VRA Applies To Washington's Felon Disenfranchisement, The District Court Was Correct In Analyzing Multiple Factors

When Congress amended § 2 of the VRA in 1982, the Senate report on the bill set out nine nonexclusive factors to be considered in determining whether a contested election practice under the "totality of the circumstances reveal that the political processes leading to nomination or election . . . are not equally open to participation by members of a [protected class] . . . in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." *Thornburg v. Gingles*, 478 U.S. 30, 43, 106 S. Ct. 2752, 92 L. Ed. 2d. 25 (1986) (alterations in original) (internal quotation marks omitted). In deciding the case, the district court found compelling evidence of racial discrimination and bias in Washington's criminal justice system and that this fell within Factor 5—the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment, and health. However, the district court went on to consider the other factors, and concluded that totality of the circumstances did not support a finding that Washington's felon disenfranchisement law results in discrimination in its electoral process on account of race.

The Community Service Society argues that the district court erred in looking beyond Factor 5. Cmty. Serv. Soc'y Amicus Br. 15–21. The thrust of their argument is that the other factors are not relevant because "Washington State has conditioned the qualifications for the franchise on the operation of its own discriminatory and biased criminal justice system[.]" Cmty. Serv. Soc'y Amicus Br. 17. Indeed, the Society goes so far as to claim that "[b]y effectively delegating decision-making on who is disqualified from voting to its criminal courts, the State has merely implemented an internal shift in governmental responsibility over a quintessential area of government regulation: the franchise." Cmty. Serv. Soc'y Amicus Br. 20.

The district court's finding does not support this broad claim. The district court found that "members of protected groups do experience discrimination within Washington's criminal justice system, leading to a disproportionate number of minority disenfranchised felons." *Farrakhan v. Gregoire*, Docket No. CV-96-076-RHW, 2006 WL 1889273, at *7 (E.D. Wash. 2006). This is a far cry from the conclusion that Washington has delegated responsibility for the franchise to the criminal court.

When the district court's actual finding is considered, it is logical that the court went on to consider other factors. Felon disenfranchisement laws are analytically similar to laws alleged to dilute the vote of a protected class. Like such laws, felon disenfranchisement is not per se unconstitutional or a violation of the VRA. Thus, just like a dilution case, the question in evaluating a felon disenfranchisement law "is whether as a result of the challenged practice or structure plaintiffs do not have an equal opportunity to participate in the political processes and to elect candidates of their choice." *Thornburg*, 478 U.S. at 44 (internal quotation marks omitted). "In order to answer this question, a court must assess the impact of the contested structure or practice on minority electoral opportunities on the basis of objective factors." *Id*. (internal quotation marks omitted).

If the plaintiffs in this case had proof of majority block voting, racially polarized voting, no success in electing minorities to office, or unresponsiveness to the needs of minority groups, it would establish the racial discrimination in the surrounding social and historical circumstances necessary to demonstrate a violation of the VRA. In that case, felon disenfranchisement, which is proper on its face, would violate the VRA because the discriminatory

impact of the practice would be attributable to racial discrimination. The lack of proof in these areas compels the opposite conclusion.[2]

RESPECTFULLY SUBMITTED this 12th day of August 2010.

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[2] The amici briefs of the National Black Police Association and the Lawyers Committee For Civil Rights argue that felon disenfranchisement interferes with the rehabilitation of felons back into society after they have completed their sentences. Nat'l Black Police Ass'n Amici Br. at 7–13; Lawyers Comm. For Civil Rights Amici Br. 8–15. The problem with this argument is that if fails to recognize the 2009 amendment to Washington's law. Prior to 2009, felons could regain the right to vote if they completed all the elements of their sentence, including the payment of legal financial obligations, and received either a certificate of discharge from a court or a final order of discharge from the board of prison terms and paroles. Wash. Rev. Code §§ 9.94A.220, 9.96.050 (1996). Under the 2009 amendment, all felons who are no longer in custody or under active supervision automatically regained the right to vote. Wash. Rev. Code § 29A.08.520 (2009).

**Certificate of Compliance Pursuant to Fed. R. App. P. 32(a)(7)(C) and Circuit Rule 32-1 for Case Number 06-35669**

I certify that:

☒ 1. Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached Supplemental Brief of Defendants-Appellees is:

- Proportionately spaced, has a typeface of 14 points or more and contains 6,986 words.

August 12, 2010
Date

s/ Jeffrey T. Even
Jeffrey T. Even

s/ William B. Collins
William B. Collins

s/ Daniel J. Judge
Daniel J. Judge

Attorneys for Defendants-Appellees

## CERTIFICATE OF SERVICE

I hereby certify that I electronically filed Supplemental Brief Of Defendants-Appellees Resonding To Amici Curiae Briefs with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the Appellate CM/ECF system on August 12, 2010.

Participants in the case who are registered CM/ECF users will be served by the Appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, to the following non-CM/ECF participants:

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